IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2022 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MOHMAD ISHAQ MOHMADHUSEN SHAIKH

Versus

COMMISSIONER OF POLCIE

Appearance:

1. Special Civil Application No. 2022 of 2003

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

MS NANDINI JOSHI,AGP for Respondent No. 1-3

CORAM : MR.JUSTICE KSHITIJ R.VYAS

Date of decision: 20/05/2003

ORAL JUDGEMENT

1. The petitioner, in this petition, has challenged the order of detention dated 14.11.2002 passed by the

Commissioner of Police, Ahmedabad City, the respondent no.1 herein. The petitioner is detained under section 3(2) of the Gujarat Prevention of Antisocial Activities Act, 1985 (in short 'the Act'). In the grounds of detention of even date supplied to the petitioner, the detaining authority has placed reliance on two prohibition cases registered against the petitioner being CR No.5035 of 2002 dated 25.6.2002 and CR No. 5002 of 2002 dated 1.1.2002 for which the petitioner is arrested on 12.11.2002. Both these cases are pending investigation. Besides the aforesaid prohibition cases, the detaining authority has also placed reliance on the incident dated 16.9.2002 and 9.10.2002 wherein the petitioner was involved in antisocial activities, as a result of which the maintenance of public order was disturbed. With respect to these two incidents, the statements of witnesses were recorded on 12.11.2002 and verification of statements was made on 13.11.2002. Considering the above material, the detaining authority has recorded a finding that the detenu being a bootlegger person within the definition of section 2(b) of the Act, with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, the detention of the petitioner is necessary and, therefore, while exercising powers under section 3(2) of the Act, the order of detention has been passed.

2. The learned Counsel for the petitioner has raised many contentions while challenging the order of detention. However, it is not necessary for me to consider all the grounds since the petition is capable of being disposed of on the ground that the detaining authority was not justified in claiming privilege under section 9(2) of the Act in public interest. Learned Counsel for the petitioner submitted that while passing the order of detention, the detaining authority has claimed privilege under section 9(2) of the Act in public interest and not disclosed the identity of two witnesses whose statements have been recorded on 12.11.2002. She has further submitted that the said statements have been verified by the detaining authority himself on 13.11.2002 and the impugned order of detention is passed on 14.11.2002 i.e. on the next day of verification. In the submission of learned Counsel, there is no time lag between the date of verification and the order of detention;the detaining authority has not inquired about the character of witnesses, their genuine apprehension, truthfulness of the incidents narrated by them, effect of the said incidents on the people and society etc. either personally and/or through any agency. The detaining authority has also not made the contemporaneous record

prior to claiming privilege under section 9(2) of the Act by not disclosing the identity of witnesses and, therefore, the subjective satisfaction arrived at by the detaining authority is not genuine and is vitiated. To substantiate the submissions, learned Counsel has placed reliance on the decision in the case of Ranubhai Bhikhabhai Bharwad Vs. State of Gujarat,2000(3) GLR 2696.

3. In the aforesaid case, statements of three witnesses which were recorded before the Police Inspector on 17.8.1999, 21.8.1999 and 25.8.1999 with regard to the incidents dated 10.7.1999, 13.6.1999 and 26.6.1999 were the material along with the proposal which is said to have been made on 27.8.1999. The Court observed that it was clear from the record that it was on 29.8.1999 that the detaining authority had recorded its verification of all these three statements and there was nothing on record to show that the detaining authority had considered the proposal dated 27.8.1999 at any time prior to 29.8.1999 and on 29.8.1999, all that had been done was that the concerned witnesses had stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30.8.1999, the detention order was passed. With the aforesaid factual details, it is observed in the said decision that:

> "The manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Section 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under section 9(2) against the disclosure of the names and addresses of the witnesses and it, thus, appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under section 9(2) and it is established that in such cases, the wrong exercise of power under section 9(2) adversely affects the detenu's right

of making an effective representation guaranteed under Art. 22(5) of the Constitution of India.

4. In the instant case also, the detaining authority, while passing the order of detention has claimed privilege under section 9(2) of the Act by not disclosing identity of two witnesses whose statements have been recorded on 12.11.2002. These statements have been verified by the detaining authority on 13.11.2002 and the detention order is passed on 14.11.2002 i.e. on the next day of verification of statements. There is no time lag between the verification and the order of detention. No material is pointed out to show that the detaining authority has inquired about the character of witnesses, their genuine apprehension, truthfulness of the incidents narrated by them, effect of the said incidents on the people and society etc. either personally and/or through any agency. I, therefore, find substance in the submission advanced on behalf of the petitioner that the detaining authority has not made contemporaneous record prior to claiming privilege under section 9(2)of the Act in not disclosing the identity of witnesses. Therefore, the subjective satisfaction arrived at by the detaining authority is not genuine and, therefore, the same is vitiated. In my opinion, the petitioner is not supplied details regarding identity of witnesses and, therefore, he could not make effective representation to the concerned authority and his valuable right guaranteed under Article 22(5) of the Constitution of India is infringed. Thus, the continuous detention of the petitioner has become illegal.

5. In the result, the petition is allowed. The impugned order of detention dated 14.11.2002 passed against the detenu is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule is accordingly made absolute with no order as to costs. Direct Service.

(Kshitij R.Vyas,J.)

[sonar]